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The Ability of Pennsylvania School Districts to Permanently Replace Striking Teachers

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I. Introduction

During the summer of 1988, the West Shore Area School District (School District or District) and the West Shore Area Education Association (Union) engaged in a labor dispute over their current collective bargaining agreement. The Union threatened to strike if its demand for increased compensation above the current contract terms was not met before the beginning of the 1988 school term.[1] The School District threatened that the teachers would be permanently replaced if the teachers actually went on strike under the contract.[2] The School District subsequently placed advertisements in local papers requesting applications for teaching positions.[3] The Union contended that the School District did not have the right to replace the teachers and that the Union had the right to strike in an effort to advance its bargaining position.[4]

On August 30, 1988, approximately 367 teachers in the West Shore Area School District went on strike.[5] Immediately after the strike commenced, the School District attempted to enjoin the strike in the Court of Common Pleas of Cumberland County.[6] Judge Ed-

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1. Harrisburg Patriot, Aug. 30, 1988, at A2, col. 3.

2. Harrisburg Patriot, Aug. 25, 1988, at B1, col. 1. The collective bargaining agreement, which remained in force until August 31, 1991, provided for "reopening" of wage negotiations for certain salaries and benefits after August 31, 1988. The entire agreement was covered by a "no-strike" clause providing that

> under no circumstances shall the Association or any employee, individually or collectively, cause, permit or take part in any strike, sitdown, slowdown, picketing, stayin, limitation, curtailment or restriction of production or interference with work in or about the Board's school system or in the movement of goods, materials or persons in or about the Board's school system and any place outside of the Board's school system.

West Shore Collective Bargaining Agreement 21 (Aug. 31, 1985) (copy on file at the Dickinson Law Review office).

3. Harrisburg Patriot, Aug. 25, 1988, at B1, col. 1. The advertisements requested individuals to replace striking union members.

4. WSE Bargaining News Alert 1 (Aug. 26, 1988) (copy on file at the Dickinson Law Review office).

5. The bargaining unit consisted of approximately 400 teachers. Harrisburg Patriot, Sept. 1, 1988, at A1, col. 1. Between 20-40 of these teachers did not participate in the strike. *Id.* at A3, col. 6.

6. The School District sought a temporary restraining order on August 30, 1988, the first day of the strike. Judge Edgar Bailey denied the School District's request and scheduled a preliminary injunction hearing for September 2, 1988.

gar Bailey denied the preliminary injunction on September 2, 1988, concluding that the issue of whether the Union could strike under the contract was arbitrable under section 903 of the Pennsylvania Public Employe Relations Act (PERA);[7] therefore, the court had no jurisdiction over the matter.[8]

The School District elected not to utilize the permanent replacement option subsequent to the court's denial of the preliminary injunction. Instead, the District agreed to enter into factfinding mediation on the condition that the teachers would return to work.[9] As a result, the Court of Common Pleas did not decide whether a school district may permanently replace striking teachers.

Pennsylvania courts and administrative agencies have yet to decide whether the Pennsylvania labor laws permit permanent replacement of striking teachers.[10] Private employers have long had the right to permanently replace employees who strike to obtain bargaining concessions.[11] Although the Pennsylvania Public Employe Relations Act authorizes certain public employees to engage in strike activity after impasse procedures have been exhausted,[12] the PERA does not indicate whether the public sector employer has the right to

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7. PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1989).

8. West Shore School Dist. v. West Shore Educ. Ass'n, No. 22 Eq. 1988 (Cumberland Co. Sept. 2, 1988). The court may have erred in its determination that it lacked jurisdiction. The court relied on East Pennsboro v. Pennsylvania Labor Relations Bd., 78 Pa. Commw. 301, 467 A.2d 1356 (1983). However, Mazzie v. Commonwealth, 495 Pa. 443, 432 A.2d 985 (1981), and Martino v. Transport Workers Union, 301 Pa. Super. 161, 447 A.2d 292 (1982), *order aff'd*, 505 Pa. 391, 480 A.2d 242 (1984), held that a status quo injunction may be issued even though the subject of the injunction is arbitrable. In Boys Market, Inc. v. Retail Clerks' Union, 398 U.S. 235 (1970), the United States Supreme Court held that injunctions may be issued to enforce collective bargaining agreements containing no-strike clauses. *Id.* at 247-48.

9. Factfinding mediation is a voluntary impasse resolution method provided for by PA. STAT. ANN. tit. 43, § 1101.801 (Purdon Supp. 1989). The section provides:

> If after a reasonable period of negotiation, a dispute or impasse exists between the representatives of the public employer and the public employes, the parties may voluntarily submit to mediation but if no agreement is reached between the parties within twenty-one days after negotiations have commenced, but in no event later than one hundred fifty days prior to the "budget submission date," and mediation has not been utilized by the parties, both parties shall immediately, in writing, call in the service of the Pennsylvania Bureau of Mediation.

PA. STAT. ANN. tit. 43, § 1101.801 (Purdon Supp. 1989).

10. It is easy to see why there is little Pennsylvania case law on the replacement issue. Many employers are hesitant to use the replacement strategy, fearing that the strike may be deemed an unfair labor practice strike. *See infra* notes 15-47 and accompanying text. Many strike settlements provide for an agreement that reinstates strikers. In addition, Pennsylvania teachers have only enjoyed the limited right to strike since 1970. See *infra* note 60 and accompanying text.

11. *See, e.g.*, NLRB v. Murray Prods., Inc., 584 F.2d 934 (9th Cir. 1978).

12. PA. STAT. ANN. tit. 43, §§ 1101.101-.1106 (Purdon Supp. 1989). *See also infra* notes 64-76.

replace lawfully striking public employees.[13] Neither the Pennsylvania Labor Relations Board (PLRB)[14] nor the courts have had occasion to rule on the ability of school districts to replace striking teachers.

This Comment first reviews the employer's right to replace employees in the private sector. It then examines the limited right to strike granted to Pennsylvania teachers by the PERA, and considers the impact of the Teacher Tenure Act and School Code on the replacement issue. This Comment also considers relevant precedents from other jurisdictions. The Comment concludes that Pennsylvania law does not prevent school districts from permanently replacing striking teachers. It also suggests valid policy reasons why school districts should utilize permanent replacements during collective bargaining disputes.

II. The Private Employer's Right to Replace Striking Employees

A private sector employer has the right to permanently replace striking employees, but this right does not exist without qualification. The employer's right to replace strikers is governed by whether the work stoppage is deemed to be an economic strike[15] or an unfair labor practice strike.[16]

In *NLRB v. MacKay Radio & Telegraph Co.*,[17] the United States Supreme Court first addressed permanent replacement of striking workers. The employer hired substitute workers during a

13. The PERA does provide that strikers who disobey a court injunction to return to work may be discharged. Section 1101.1005 of title 43 provides:

> If a public employe refuses to comply with a lawful order of a court of competent jurisdiction issued for a violation of any of the provisions of this article the public employer shall initiate an action for contempt and if the public employe is adjudged guilty of such contempt, he shall be subject to suspension, demotion, or discharge at the discretion of the public employer . . . .

PA. STAT. ANN. tit. 43, § 1101.1005 (Purdon Supp. 1989).

14. The Pennsylvania Labor Relations Board is the state equivalent of the National Labor Relations Board. The PLRB is empowered to hear all cases involving unfair labor practices, and has jurisdiction to prevent unfair labor practices. *See* PA. STAT. ANN. tit. 43, § 1101.1301 (Purdon Supp. 1989).

15. "An economic strike is a work stoppage that is not caused or prolonged by an employer's unfair practices, not in breach of a valid existing contract, and is not for an illegal purpose." 2 B. WERNE, LABOR RELATIONS LAW & PRACTICE 144 (1966).

16. "An unfair labor practice strike is caused, or prolonged in whole or in part, by employer unfair practices." *Id.* A strike will be characterized as an unfair labor practice strike if an unfair labor practice precipitated the strike to any degree, even if it was only one of the causes of the strike. An economic strike may become an unfair labor practice strike if the employer uses illegal tactics during the course of the strike. *See* 2 B. WERNE, LABOR RELATIONS LAW & PRACTICE 144-45 (1966).

17. 304 U.S. 333 (1938).

work stoppage.[18] When the strike ended, the employer reinstated some but not all of the strikers.[19] The Supreme Court noted that although union members have a statutory right to strike,[20] the employer does not lose the right to protect and continue the business by filling places left vacant by striking workers.[21] The Court added that the employer had not violated the law by offering the replacements permanent employment.[22] No employer was "bound to discharge those hired to fill the places of the strikers, upon the election of the latter to resume their employment, in order to create places for them."[23]

Since the Supreme Court decided *MacKay* in 1938, it has been considered a settled principle of private sector labor law that an employer may hire permanent replacements in order to keep its business in operation, thereby depriving the replaced strikers of an immediate right to reinstatement.[24] This right, however, is limited. The employer must demonstrate that the replacements are permanent.[25] If the replacements are hired on a temporary basis, such as for the duration of the strike, the economic striker is entitled to reinstate-

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18. *Id.* at 337.

19. *Id.* at 338-39.

20. Section 13 of the National Labor Relations Act (NLRA), 29 U.S.C. § 163 (1982), provides that "[N]othing in [the NLRA], except as specifically provided for herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." 29 U.S.C. § 163 (1982). Public employers are excluded from the NLRA. *See* 29 U.S.C. § 152(2) (1982) (employer does not include a state or its political subdivisions).

21. 304 U.S. at 345.

22. *Id.* at 346.

23. *Id.* at 345-46. However, an economic strike is deemed to be protected activity under § 7 of the NLRA. While economic strikers may be permanently replaced, they may not be summarily discharged for engaging in strike activity. *See, e.g.*, NLRB v. U.S. Cold Storage Corp., 203 F.2d 924, 927 (5th Cir.), *cert. denied*, 346 U.S. 818 (1953). It is an unfair labor practice for a private employer to discharge an employee for engaging in economic strike activity. *See, e.g.*, NLRB v. International Van Lines, 409 U.S. 48, 50 (1972). This Comment will not generally discuss the employer's ability to discharge strikers, except when necessary to clarify the reinstatement position.

24. The courts have consistently upheld this position over the last 52 years. *See, e.g.*, Belknap v. Hale, 463 U.S. 491 (1983); Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976); NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); Mastro Plastics v. NLRB, 350 U.S. 270 (1956). *See also* Vulcan-Hart Corp. v. NLRB, 718 F.2d 269, 274 (8th Cir. 1983) (indicating that the legal parameters of replacements by employers are well defined). The NLRB has upheld this employer right in a long line of rulings. *See, e.g.*, Hill Eng'g, Inc., 171 N.L.R.B. 472 (1968); Hot Shoppes, Inc., 146 N.L.R.B. 802 (1964); Northern Crate & Lumber Co., 105 N.L.R.B. 218 (1953); Vogue Lingerie, Inc., 123 N.L.R.B. 1009 (1950).

25. *See* J.E. Stiegerwald Co., 263 N.L.R.B. 483, 492 (1982) (burden of establishing that replacements were bona fide is upon the employer), *and* NLRB v. Murray Prods., Inc., 584 F.2d 934 (9th Cir. 1978) (employer failed to prove that the replacements were permanent).

ment upon an unconditional application to return to work.[26] If a vacancy exists in an equivalent position, the employer is required to reinstate the striker in this position.[27] The displaced worker is also entitled to be placed on a preferential hiring list and given the first opportunity to fill future openings.[28]

The Supreme Court first recognized the right of permanently replaced strikers to preferential hiring status in *NLRB v. Fleetwood Trailer Co.*[29] In *Fleetwood*, strikers applied for reinstatement at the end of a strike.[30] Their jobs no longer existed, however, because the strike's severity caused a cutback in production.[31] When full production resumed months later, the employer hired new personnel instead of reinstating the displaced strikers.[32] The Court held that "if and when a job for which a displaced striker is qualified becomes available, [the striker] is entitled to an offer of employment."[33] Reinstatement can only be avoided if the employer demonstrates "legitimate and substantial business justifications" for refusing to reinstate the worker.[34]

The National Labor Relations Board (NLRB)[35] refused to limit the duration of the reinstatement rights of economic strikers who made an unconditional application for reinstatement.[36] In *Brooks Research & Manufacturing, Inc.*,[37] the NLRB rejected an employer's complaint that intolerable burdens would be imposed if the obligation to seek out former strikers to fill job openings continued indefinitely.[38]

This extended protection of reinstatement rights can be justified by an examination of the status of displaced strikers. An economic strike is deemed to be protected activity under section seven of the National Labor Relations Act (NLRA).[39] Consequently, an em-

26. NLRB v. International Van Lines, 409 U.S. 48, 50-51 (1972).
27. Little Rock Airmotive, Inc. v. NLRB, 455 F.2d 163, 164 (8th Cir. 1972).
28. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 382-83 (1967) (Harlan, J., concurring).
29. 389 U.S. 375 (1967).
30. *Id.* at 376.
31. *Id.*
32. *Id.* at 377.
33. *Id.* at 381.
34. 389 U.S. at 380.
35. The National Labor Relations Board's power and jurisdiction are described in 29 U.S.C. §§ 153-68 (1982).
36. Brooks Research & Mfg., Inc., 202 N.L.R.B. 634, 636 (1973). Strikers guilty of misconduct during a strike, however, need not be reinstated. *See* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 252 (1939).
37. 202 N.L.R.B. 634 (1973).
38. *Id.* at 636.
39. 29 U.S.C. § 157 (1982). *See, e.g.*, NLRB v. U.S. Cold Storage Corp., 203 F.2d 924,

ployer cannot discharge an employee for engaging in an economic strike; it may only permanently replace the striker. Thus, employees who are not working because of a labor dispute continue to be employees of their employer.[40] A striking employee continues to be an employee during the strike and only removes himself from labor.[41] The striker retains this status at all times and may become a working employee when the strike is terminated.[42] This status affords replaced employees the continuing protection of the NLRA.[43]

An employer must immediately reinstate all strikers upon termination of an unfair labor practice strike.[44] The strikers are entitled to reinstatement if they unconditionally demand it, even if this entails the dismissal of permanent replacements hired to fill their positions during the strike.[45] The employer may continue operating during the strike by hiring replacements to serve pending the termination of the strike. When the unfair labor practice strike ends, the employer must reinstate the strikers to their original positions, whether or not replacements have been made.[46] By contrast, the employer may permanently replace the economic striker and is under no obligation to reinstate the striker immediately or remove the replacement worker.[47]

The conflict between the workers' right to strike and the employer's right to permanently replace the workers represents the pressure and counterpressure left to "the free play of economic forces."[48] The union uses the strike weapon as leverage to force demands upon the employer.[49] The employer has the right to permanently replace striking workers to keep its operations continuing and

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927 (5th Cir.), *cert. denied*, 346 U.S. 818 (1953).

40. NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

41. Penflex, Inc. v. Bryson, 506 Pa. 274, 287, 485 A.2d 359, 365 (1984).

42. *Id.* This status may change, however, if a displaced striker has obtained regular and substantially equivalent employment elsewhere. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381 (1967).

43. NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 347 (1938). Thus, reinstated employees are entitled to full employment benefits, including seniority. Globe Molded Plastics Co., 204 N.L.R.B. 1041, 1043-44 (1973).

44. NLRB v. Crystal Springs Shirt Corp., 637 F.2d 399, 404 (5th Cir. 1981). This reinstatement is required because the workers were displaced by an unfair labor practice. Unfair labor practice strikes are protected by the NLRA. *See generally* Comment, *Reconversion of Unfair Labor Practice Strikes to Economic Strikes*, 64 GEO. L.J. 1143 (1976).

45. NLRB v. Remington Rand, Inc., 130 F.2d 919, 927-28 (2d Cir. 1942) (right to reinstatement is unconditional).

46. Mastro Plastics v. NLRB, 350 U.S. 270, 278 (1956).

47. NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

48. Belknap, Inc. v. Hale, 463 U.S. 491, 535-36 (1983) (Brennan, J., dissenting).

49. GOLDMAN, LABOR LAW AND INDUSTRIAL RELATIONS IN THE UNITED STATES OF AMERICA 268 (1984).

counter the union pressure.

This mutual economic pressure encourages both sides to seek accommodation. The union has an incentive to negotiate in good faith in order to decrease the risk of immediate loss of income during the strike and the possibility that the employer's business losses or permanent replacement policy will reduce the number of jobs available when the strike ends.[50] The employer risks immediate loss of income and future losses due to decreased competitiveness caused by the strike.[51] Although the employer could mitigate income losses by permanently replacing strikers, this would involve other risks. Replacements may be limited or untrained. Also, any attempt to continue operations may increase union hostility.[52] The employer, however, can use the replacement option to counter unreasonable union militancy. An employer will hire permanent replacements when there is a total loss of confidence in the union membership. The employer's loss of confidence in the union leads to a conviction that the dispute cannot be resolved at the bargaining table.[53] Thus, permanent replacement serves as a check on union abuse, deterring the exercise of the strike option and consequent increases in industrial strife.[54]

III. The Right of the Pennsylvania Public Employee to Strike

Until the Pennsylvania General Assembly enacted the Pennsylvania Public Employe Relations Act (PERA),[55] public employees were absolutely forbidden to strike.[56] Traditional doctrine held that there was "no right to strike in the public sector by anybody, anywhere, anytime."[57] A Pennsylvania statute specifically banned public employee strikes.[58] In 1970, however, the General Assembly deter-

50. Dripps, *New Directions for the Regulation of Public Employee Strikes*, 60 N.Y.U. L. REV. 590, 605 (1985).

51. In order to absorb the cost of giving into union demands, the manufacturer would increase the price of the goods, which would tend to diminish the employer's ability to compete effectively. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW § 11.1, at 240 (2d ed. 1977).

52. Unkovic & Harty, *Management's Legal Problems in Continuing Plant Operations During an Economic Strike Under Federal and Pennsylvania Law*, 67 DICK. L. REV. 63, 65 (1962).

53. *Id.* at 64.

54. R. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 342 (1976).

55. PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Purdon Supp. 1989).

56. PA. STAT. ANN. tit. 43, § 215.2 (Purdon 1964), *partially repealed by* PA. STAT. ANN. tit. 43, § 1101.2201 (Purdon Supp. 1989).

57. Broadwater v. Otto, 370 Pa. 611, 614, 88 A.2d 878, 880 (1952).

58. PA. STAT. ANN. tit. 43, § 215.2 (Purdon 1964), *partially repealed by* PA. STAT. ANN. tit. 43, § 1101.2201 (Purdon Supp. 1989).

mined that public employees should be granted a "limited right to strike"[59] and adopted the PERA.[60]

By adopting the Public Employe Relations Act, Pennsylvania granted to all public employees, except policemen and firemen, the right to organize and bargain collectively.[61] The PERA established mediation, factfinding, and arbitration procedures to encourage resolution of collective bargaining disputes.[62] The General Assembly believed that extending a qualified right to strike to public employees would strengthen this negotiation process.[63]

The PERA provides public employees with the right to strike. This grant, however, contains substantial limitations.[64] Only those state and local employees who meet the definition of public employees and who are not specifically precluded from striking by the PERA are permitted to strike.[65] The PERA does not permit strikes by prison guards, guards at mental hospitals, and employees directly involved with and necessary to the functioning of the courts of

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59. The Governor's Commission used this phrase to characterize the proposed right to strike. *See* GOVERNOR'S COMMISSION TO REVISE THE PUBLIC EMPLOYEE LAW OF PENNSYLVANIA, REPORT AND RECOMMENDATIONS 5 (1968) [hereinafter GOVERNOR'S COMMISSION].

60. PA. STAT. ANN. tit. 43, §§ 1101.101-.2203 (Purdon Supp. 1989).

61. The Collective Bargaining by Police and Firemen's Act, PA. STAT. ANN. tit. 43, §§ 217.1-.10 (Purdon Supp. 1989), controls the collective bargaining process for policemen and firemen.

62. PA. STAT. ANN. tit. 43, §§ 1101.801-.807 (Purdon Supp. 1989).

63. GOVERNOR'S COMMISSION, *supra* note 59, at 13.

64. Twelve states currently allow strikes by public employees. Nine states authorize public employee strikes by statute: Alaska, Hawaii, Illinois, Minnesota, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin. *See* ALASKA STAT. § 23.40.200 (1984); HAWAII REV. STAT. § 89-12 (1985); ILL. ANN. STAT. ch. 48, para. 1617 (Smith-Hurd Supp. 1989); MINN. STAT. ANN. § 179A.18 (West Supp. 1990); OHIO REV. CODE ANN. § 4117.14(D) (Baldwin 1983); OR. REV. STAT. § 243.726 (1987); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1989); VT. STAT. ANN. tit. 21, § 1730 (1987); WIS. STAT. ANN. § 111.70(4)(l) (West 1988). California, Idaho, and Montana allow public sector strikes under their common law. *See* County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n, 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985); Local 1494, Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978); Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 529 P.2d 785 (1974).

65. PA. STAT. ANN. tit. 43, § 1101.301(2) (Purdon Supp. 1989). The PERA defines public employee as:

> [A]ny individual employed by a public employer but shall not include elected officials, appointees of the Governor with the advice and consent of the Senate as required by law, management level employes, confidential employes, clergymen or other persons in a religious profession, employes or personnel at church offices or facilities when utilized primarily for religious purposes and those employes covered under the act of June 24, 1968 (Act No. 111), entitled "An act specifically authorizing collective bargaining between policemen and firemen and their public employers; providing for arbitration in order to settle disputes, and requiring compliance with collective bargaining agreements and findings of arbitrators."

PA. STAT. ANN. tit. 43, § 1101.301(2) (Purdon Supp. 1989).

Pennsylvania.[66]

Additionally, those employees permitted to strike under the statute do not have an unlimited right to do so. Public employees may not strike until mandatory impasse procedures are utilized and exhausted.[67] These impasse procedures include mediation and factfinding.[68] If the impasse continues after a reasonable negotiation period, the parties may voluntarily submit to mediation.[69] If the impasse is not resolved within a specified period of time and the parties have not voluntarily resorted to mediation, the parties must submit the issue to mediation.[70]

Once mediation is commenced, it continues until the parties reach an agreement.[71] If the parties do not reach an agreement within a specified time, the Pennsylvania Labor Relations Board (PLRB) has the discretion to continue mediation, appoint a factfinding panel, or terminate mediation.[72] If the PLRB orders mediation or establishes a factfinding panel, public employees must exhaust these remedies before striking.[73] During this time the parties may voluntarily agree to submit the issue to binding arbitration.[74] Once the parties have exhausted the impasse procedures, the public employees are permitted to strike unless or until the "strike creates a clear and present danger or threat to the health, safety or welfare of the public."[75]

If the school district believes that the strike is outside the limited right to strike, it may seek an injunction in the court of common pleas in which the strike occurs.[76] Unfortunately, this statutory check against union abuse of the right to strike has proven illusory. Pennsylvania courts have indicated that the normal incidents of a strike do not constitute a "clear and present danger."[77] The confusion, disruption, inconvenience, and added costs normally associated with a strike will not ordinarily justify the issuance of an injunc-

66. PA. STAT. ANN. tit. 43, § 1101.1001 (Purdon Supp. 1989).
67. PA. STAT. ANN. tit. 43, §§ 1101.1001-.1010 (Purdon Supp. 1989).
68. *Id.* § 1101.801-.802.
69. *Id.* § 1101.801.
70. *Id.*
71. *Id.*
72. *Id.* § 1101.802.
73. PA. STAT. ANN. tit. 43, § 1101.802 (Purdon Supp. 1989). For an interpretation of this provision, see Bellefonte Area Educ. Ass'n v. Board of Educ. of Bellefonte Area School Dist., 9 Pa. Commw. 210, 304 A.2d 922 (1973).
74. PA. STAT. ANN. tit. 43, § 1101.804 (Purdon Supp. 1989).
75. *Id.* § 1101.1003 (Purdon Supp. 1989).
76. *Id.*
77. Bristol Township Educ. Ass'n v. School Dist. of Bristol Township, 14 Pa. Commw. 463, 467, 322 A.2d 767, 769 (1974).

tion.[78] If the normal incidents of a teacher strike accumulate to a great extent, continue for a long period of time, or are aggravated by some unexpected event, however, the public health, safety, and welfare might be endangered.[79]

In order to determine whether an injunction is warranted, courts consider factors such as the population percentage affected by the strike, the risk that government funds will be lost, the effects of program loss on the community, and potential or actual violence during the strike.[80] No clear standards exist to determine exactly how long a strike may continue. Moreover, school boards are reluctant to seek injunctions because many judges simply order extensive negotiation sessions instead of enjoining the strike.[81] Whether the strike is legal or illegal, serious obstacles exist to obtaining timely injunctions.[82]

These statutory remedies have failed to limit strikes in Pennsylvania. Statistics compiled by the Pennsylvania Bureau of Labor Relations indicate that injunctions were obtained in only five of the forty-six illegal strikes by state employees between 1972 and 1977.[83] Injunctions were obtained in two of the four legal strikes.[84] This is particularly troubling in view of the high incidence of teacher strikes in Pennsylvania. Since the PERA was enacted in 1970, there have been over 600 teacher strikes in Pennsylvania.[85] From 1970 until 1985, Pennsylvania had a staggering total of 22.9 percent of school strikes in the entire nation.[86]

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78. *See* Armstrong School Dist. v. Armstrong Educ. Ass'n, 5 Pa. Commw. 378, 386, 291 A.2d 120, 125 (1972).

79. *Id.*

80. The courts of Pennsylvania have suggested several criteria to be used in determining the level of risk to the health, safety, and welfare of the public. *See* Bristol Township Educ. Ass'n v. School Dist. of Bristol Township, 14 Pa. Commw. 463, 322 A.2d 767 (1974) (percentage of the population denied education); Armstrong Educ. Ass'n v. Armstrong School Dist., 5 Pa. Commw. 378, 291 A.2d 120 (1972) (danger of loss of state subsidies to district); Blackhawk School Dist. v. Pa. State Educ. Ass'n, 64 Pa. D. & C.2d 665 (C.P. Beaver Co. 1976) (special segments of the community affected). For other factors, *see generally* Decker, *The Right to Strike for Pennsylvania's Public Employees—Its Scope, Limits, and Ramifications for the Public Employer*, 17 DUQ. L. REV. 755 (1978-79).

81. REPORT OF THE SENATE TASK FORCE ON ACT 195 22 (1983-84).

82. GOVERNOR'S STUDY COMMISSION ON PUBLIC EMPLOYEE RELATIONS: RECOMMENDATIONS FOR LEGISLATIVE AND ADMINISTRATIVE CHANGE TO THE PUBLIC SECTOR COLLECTIVE BARGAINING LAWS OF PENNSYLVANIA 29 (June 1, 1978) [hereinafter GOVERNOR'S STUDY COMMISSION].

83. *Id.* at 27.

84. *Id.*

85. Harrisburg Patriot, Sept. 4, 1983, at D1, col. 1.

86. Pennsylvania School Boards Association, 23 Information Legislative Service 2, 4 (chart 8) (Aug. 30, 1985) (copy on file at the Dickinson Law Review office).

IV. The Replacement Option in the Public Sector

The PERA does not provide public sector employers with an affirmative right to replace public sector employees during strikes. The National Labor Relations Act is also silent on the issue of employee replacement,[87] but the Supreme Court has construed the NLRA to permit permanent replacement of strikers.[88] This section reviews the legislative history and language of the PERA, considers the Pennsylvania Teacher Tenure Act[89] and the Pennsylvania School Code,[90] and concludes that nothing in these statutes prevents school districts from hiring permanent replacements in order to keep schools functioning during teacher strikes.

A. The Pennsylvania Public Employe Relations Act

The Pennsylvania Public Employe Relations Act granted to public employees certain rights they had previously been denied,[91] including a limited right to strike.[92] The General Assembly believed that the limited right to strike would act as a safety valve and would actually prevent strikes.[93] The threat of work stoppage could curb possible intransigence by public employers during negotiations.[94] In addition, some believed that it was inequitable to forbid public employees to strike while allowing private employees to do so.[95] Accordingly, the General Assembly granted to public employees the right to strike unless or until that right threatened the health, safety, or welfare of the public.[96]

Arguably, allowing public employers to permanently replace teachers would render the right to strike illusory. School districts could effectively prevent teachers from exercising the right to strike by lining up replacement teachers, filling the places of any teachers

87. Public employers are excluded from the NLRA. 29 U.S.C. § 152(2) (employer does not include a state or its political subdivisions).

88. *See* NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938).

89. PA. STAT. ANN. tit. 24, §§ 11-1121 to -1133 (Purdon 1962 & Supp. 1989). The Teacher Tenure Act is contained within the School Code. *See infra* note 90.

90. PA. STAT. ANN. tit. 24, §§ 1-101 to 27-2702 (Purdon 1962 & Supp. 1989).

91. The PERA granted all public employees the right to organize and bargain collectively through representatives. It also extended the right to strike after impasse procedures have been followed. The statutory language was patterned after the NLRA. *See* Decker, *The Right To Strike for Pennsylvania's Public Employees—Its Scope, Limits, and Ramifications for the Public Employer*, 17 DUQ. L. REV. 761 (1978-79).

92. PA. STAT. ANN. tit. 43, §§ 1101.1001-.1010 (Purdon Supp. 1989).

93. GOVERNOR'S COMMISSION, *supra* note 59, at 14.

94. *Id.* at 13.

95. *Id.*

96. PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1989).

who exercised their right to strike.[97] The legislature intended that public employees should have a statutory right to strike, which might arguably be denied if public employers may permanently replace strikers.

In addition, the legislature adopted the PERA in order to create a comprehensive scheme for public employee relations.[98] The PERA provides specific remedies to public employers in the event that the public employees exceed the limits of the right to strike. If the strike goes beyond the legislative grant, the school district may seek an injunction to force teachers back to work.[99] If the teachers disobey the injunction, strict penalties may be levied including suspension, demotion, or discharge at the public employer's discretion.[100] The PERA generally does not provide the public employer with any remedies in the event of a lawful strike.[101] Thus, it could be argued that the PERA sets forth the exclusive range of remedies available to public employers. Since replacement is not an option provided to public employers by the PERA, arguably that remedy should not be permitted.[102]

The NLRA also fails to address the permanent replacement issue. The right to permanently replace strikers is not to be found within the language of the Act. Although the Act states that nothing in it shall be construed to either interfere with, impede, or diminish in any way the right to strike,[103] the Supreme Court has construed the NLRA to permit the permanent replacement of striking workers.[104]

The PERA was modeled after the NLRA.[105] Nothing in the

97. The PERA contains protections against this scenario. If the school district purposely replaces teachers in order to harm the union, the school board would be guilty of an unfair labor practice. PA. STAT. ANN. tit. 43, § 1101.1201(a) (Purdon Supp. 1989). Public employers, their agents and representatives may not interfere, restrain, or coerce employees in the exercise of the rights guaranteed to employees by the PERA. *Id.* The Pennsylvania Labor Relations Board could prevent a school district from replacing teachers merely because they exercised their right to strike. *See* PA. STAT. ANN. tit. 43, § 1101.1301 (Purdon Supp. 1989).

98. GOVERNOR'S COMMISSION, *supra* note 59, at 3.

99. *See* PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1989).

100. PA. STAT. ANN. tit. 43, § 1101.1005 (Purdon Supp. 1989).

101. If the strike threatens the health, safety, or welfare of the public, the strike may be enjoined. PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1989).

102. This argument has not been addressed by any Pennsylvania court. Other comprehensive legislative schemes, such as the Landlord-Tenant Act, PA. STAT. ANN. tit. 68, §§ 250.101 to .554 (Purdon 1962 & Supp. 1988), have been held to provide exclusive remedies. *See* Kuriger v. Cramer, 345 Pa. Super. 595, 498 A.2d 1331 (1985). Similar arguments could be applied to the PERA.

103. *See supra* note 20 and accompanying text.

104. *See supra* notes 17-23 and accompanying text.

105. *See supra* note 91 and accompanying text.

PERA indicates that the General Assembly meant to grant public employees any greater protection than that offered to private employees by the NLRA; indeed, the opposite is true. One purpose of the PERA is to provide adequate means to resolve disputes and minimize their impacts.[106] If school districts are not permitted to utilize permanent replacements, the harmful effects of teacher strikes would be increased. Moreover, the General Assembly intended to provide public employees with a "limited" right to strike.[107]

An interpretation of the PERA that prevents teacher replacement would turn the Act on its head. Such an interpretation would provide public employees with greater protection during strikes than that enjoyed by private employees under the same circumstances. Nothing in the PERA indicates that the General Assembly meant to so tie the public employer's hands.[108] The General Assembly of Pennsylvania could rely on over thirty years of case law interpreting employer's rights under the NLRA.[109] If the General Assembly desired to limit the public employer's response to a legal strike, it could have easily provided such a limitation in the PERA. Indeed, one provision of the statute specifically provides that nothing in the PERA would "impair the employer's right to hire employees or to discharge

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106. The purpose of the PERA is set forth in PA. STAT. ANN. tit. 43, § 1101.101 (Purdon Supp. 1989). This section provides:

> The General Assembly of the Commonwealth of Pennsylvania declares that it is the public policy of this Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employes subject, however, to the paramount right of the citizens of this Commonwealth to keep inviolate the guarantees for their health, safety and welfare. Unresolved disputes between the public employer and its employes are injurious to the public and the General Assembly is therefore aware that adequate means must be established for minimizing them and providing for their resolution. Within the limitations imposed upon the governmental processes by these rights of the public at large and recognizing that harmonious relationships are required between the public employer and its employes, the General Assembly has determined that the overall policy may best be accomplished by (1) granting to public employes the right to organize and choose freely their representatives; (2) requiring public employers to negotiate and bargain with employe organizations representing public employes and to enter into written agreements evidencing the result of such bargaining; and (3) establishing procedures to provide for the protection of the rights of the public employe, the public employer and the public at large.

PA. STAT. ANN. tit. 43, § 1101.101 (Purdon Supp. 1989).

107. GOVERNOR'S COMMISSION, *supra* note 59, at 5.

108. The opposite is true. The PERA provides public employees less protection during strikes than that enjoyed by private employees. The PERA provides only a "limited right to strike." *See supra* note 59 and accompanying text.

109. The Supreme Court decided *MacKay Radio* in 1938. A long line of subsequent cases has firmly established the employer's permanent replacement rights. *See supra* note 24 and accompanying text.

them for just cause consistent with existing legislation."[110]

Pennsylvania courts have never interpreted the PERA to provide exclusive remedies to public employers.[111] Pennsylvania courts have acknowledged the continuing viability of remedies beyond those created by the statute. In *Philadelphia Federation of Teachers, Local No. 3 v. Board of Education of the School District of Philadelphia*,[112] the court noted that the courts could enforce remedies that lay beyond the scope of the PERA.[113] Thus, employees who breach their collective bargaining contracts by engaging in a wildcat strike permitted by the PERA may still be discharged by an employer.[114] The argument that the PERA provides the only remedies available to a public employer is therefore unpersuasive.

It also appears unlikely that the Pennsylvania courts would render the right to strike illusory by allowing public employers to exercise the permanent replacement option. If the conditions of the PERA are met,[115] employees may strike. The legislature enacted the PERA in order to grant public employees this right. The General Assembly did not intend, however, to prevent employers from minimizing the effects of such strikes. The General Assembly provided adequate protections in the statute to prevent school districts from utilizing permanent replacements unfairly.[116] If permanent replacement is allowed under Pennsylvania law, public employees would be allowed to exercise their right to strike while the right of the employer to keep operations running would be preserved.

B. The Teacher Tenure Laws

Pennsylvania teachers are protected by the Teacher Tenure

110. PA. STAT. ANN. tit. 43, § 1101.706 (Purdon Supp. 1989).

111. *See supra* note 102 and accompanying text.

112. 438 Pa. 342, 327 A.2d 47 (1974).

113. *Id.* at 345 n.3, 327 A.2d at 49 n.3.

114. Pennsylvania Labor Relations Bd. v. Fortiner, 395 Pa. 247, 254-55, 150 A.2d 122, 126-27 (1959). *Cf.* Hollinger v. Department of Pub. Welfare, 469 Pa. 358, 365 n.10, 365 A.2d 1245, 1249 n.10 (1976).

115. *See* PA. STAT. ANN. tit. 43, §§ 1101.1003 (Purdon Supp. 1989). Legal strikes can only be enjoined when the public's health, safety, or welfare are threatened. *See* PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1989). Equity courts may enjoin illegal strikes. *See* Boys Market, Inc. v. Retail Clerks' Union, 398 U.S. 235, 253 (1970). For examples of strikes that would be illegal under the PERA, *see generally* Decker, *The Right to Strike for Pennsylvania's Public Employees—Its Scope, Limits, and Ramifications for the Public Employer*, 17 DUQ. L. REV. 761 (1978-79); *see also* notes 37-39 and accompanying text.

116. The use of the permanent replacement option to deliberately attempt to discourage union support would be an unfair labor practice. *See supra* note 97 and accompanying text. The PLRB is authorized to prevent such unfair practices. *See* PA. STAT. ANN. tit. 43, § 1101.1301 (Purdon Supp. 1989).

Act,[117] in addition to the protections afforded them by the PERA. By design, teacher tenure laws provide that employees retain full employment status unless and until they commit an act that constitutes cause for revoking that status. The Pennsylvania teacher tenure laws generally impose significant constraints on the freedom of Pennsylvania school districts to make personnel moves such as discharges, replacements, and transfers.[118] This section reviews the Teacher Tenure Act to determine if this law limits the school district's ability to respond to a strike by hiring permanent replacements.

Arguably, the provisions of the Teacher Tenure Act preclude school districts from permanently replacing teachers because strike activity is not among the reasons that constitute cause for a school district to replace or discharge teachers. The General Assembly adopted the Teacher Tenure Act in 1937.[119] In order to preserve the educational employment system from arbitrary interference, the Teacher Tenure Act removed the school board's discretionary power to remove employees without cause.[120] The statute was designed to "maintain an adequate . . . teaching staff, free from political and . . . arbitrary interference, whereby capable and competent teachers might feel secure and more efficiently perform their duty of instruction."[121]

Three provisions of the Tenure Act may affect the permanent replacement of striking teachers: the discharge, suspension, and substitute teacher provisions. The discharge provision of the Teacher Tenure Act provides that the only valid causes for termination of a teacher's contract are "immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, advocation of or participating in un-American or subversive doctrines, [or] persistent and willful violation of the school laws of [the] Commonwealth . . . ."[122] Pennsylvania courts have held that these enumerated reasons are the exclusive allowable reasons for discharging teachers.[123] This list does not appear to include participation in a teacher strike.[124] Under federal law, striking employees cannot be discharged

117. PA. STAT. ANN. tit. 24, §§ 11-1121 to -1133 (Purdon 1962 & Supp. 1989).

118. *See id.* §§ 11-1122 to 11-1124.

119. *See* Malone v. Hayden, 329 Pa. 213, 217, 197 A. 344, 349 (1938).

120. *Id.* at 222, 197 A. at 351.

121. Sporie v. Eastern Westmoreland Area Vocational Technical School, 47 Pa. Commw. 390, 394, 408 A.2d 888, 891 (1979).

122. PA. STAT. ANN. tit. 24, § 11-1122 (Purdon 1962).

123. *See, e.g.*, Neshaminy Fed'n of Teachers v. Neshaminy School Dist., 501 Pa. 534, 547, 462 A.2d 629, 636 (1983); West Shore School Dist. v. Bowman, 48 Pa. Commw. 104, 113, 409 A.2d 474, 479-80 (1979).

124. Arguably, however, a teacher strike might be considered dischargeable conduct.

for exercising their right to strike.[125] The discharge provision of the Teacher Tenure Act simply reinforces this accepted labor doctrine. Thus, the school district cannot terminate teachers' contracts during a strike.

The discharge provisions, however, do not address the basic theory of permanent replacement. Teachers' employment contracts are not terminated when teachers are permanently replaced. The teachers' employment contract rights would be preserved while they are absent from labor.[126] The teachers would be entitled to reinstatement upon the next available opening.[127] The discharge provision does not directly conflict with the permanent replacement option.

The suspension and substitute provisions of the Teacher Tenure Act[128] come into more direct conflict with the replacement theory. Under the Teacher Tenure Act, a suspension is an impermanent separation, and is considered a furlough or layoff.[129] Teachers who have been permanently replaced during a strike may argue that they should be treated as suspended teachers.[130] Although the employer-employee relationship continues, the teachers will not be able to work or receive compensation until a new position becomes available.

Persistent and willful failure to report to work constitutes grounds for dismissal. *See* Johnson v. United School Dist. Joint School Bd., 201 Pa. Super. 375, 101 A.2d 897 (1963) (teacher's refusal to attend an open house, though required and repeatedly told to do so, constituted a persistent and willful violation of the school laws). Refusal to accept a work assignment was a ground for dismissal in Wesenberg v. School Dist. of City of Bethlehem, 148 Pa. Super. 250, 256, 24 A.2d 673, 676 (1942). Additionally, violations of school board resolutions are grounds for dismissal. *See* Fink v. Board of Educ., 65 Pa. Commw. 320, 442 A.2d 837 (1982). However, this position would directly conflict with the teacher's statutory right to strike. In addition, the school board's motivation for requiring teachers to report to work would be suspect. This argument would allow the school board to discharge teachers engaged in illegal strike activity. Discharged teachers would be entitled to a hearing under the Teacher Tenure Act. PA. STAT. ANN. tit. 24, § 11-1127 (Purdon 1962).

125. It is an unfair labor practice for a private employer to discharge an employee for engaging in a strike. *See, e.g.*, NLRB v. United States Cold Storage Corp., 203 F.2d 924, 927 (5th Cir.), *cert. denied*, 346 U.S. 818 (1953).

126. Teachers who strike will not be considered to have repudiated their employment contracts. Penflex, Inc. v. Bryson, 506 Pa. 274, 295-96, 485 A.2d 359, 370 (1984). The striking employee retains a reasonable expectation of continued employment during the strike. *Id.* When the strike ends, the employee again becomes a working employee. Pramco, Inc. v. Unemployment Compensation Bd. of Review, 396 Pa. 560, 564, 154 A.2d 875, 877 (1959). A teacher is under contract with the school district. This contract is permanent unless terminated in accordance with the provisions of the Tenure Act. A teacher will not be considered to have resigned the position unless that resignation is in writing. Rice v. Ford, 2 Pa. D. & C.2d 543, 551 (C.P. Schuylkill Co. 1954).

127. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381 (1967).

128. PA. STAT. ANN. tit. 24, §§ 11-1124 to -1125.1 (Purdon 1962 & Supp. 1989).

129. Norwin School Dist. v. Chlodney, 37 Pa. Commw. 284, 286, 390 A.2d 328, 330 (1978).

130. This argument is more plausible than that based on the discharge provision because suspended employees retain many of the rights that permanently replaced individuals retain. *See* PA. STAT. ANN. tit. 24, § 11-1125.1 (Purdon Supp. 1989).

Teachers may argue that they can only be placed in this position for the reasons listed in the tenure law. The Teacher Tenure Act provides that the school board can suspend teachers when student enrollment declines substantially, school districts are consolidated, or educational programs are curtailed or altered.[131] Pennsylvania courts have held that teachers may not be suspended for other reasons.[132] A suspension for any other reason would be invalid.[133] These categories do not appear to cover participation in a teacher strike. Thus, teachers who go on strike would be entitled to their positions upon their return because the school district cannot justify the teacher's removal from employment under the Teacher Tenure Act.

The School Code[134] definition of a substitute teacher further supports this position. The term substitute includes any individual who has been employed to perform the duties of a teacher while the teacher is absent from work due to a sabbatical leave or for any other legal cause authorized and approved by the school board.[135] When a vacancy occurs because a teacher is on leave but expected to return, a temporary vacancy exists that may only be filled by a substitute teacher.[136] A teacher hired to fill a position to which a regular teacher fully intends to return can only be classified as a substitute because a bona fide vacancy does not exist.[137] Thus, the Teacher Tenure Act definition would appear to permit only the hiring of temporary replacements, and to forbid the hiring of permanent replacements.

These tenure provisions, however, were not intended to grant teachers the right to permanently retain their positions and pay regardless of need for their services or interference with the control of school policy.[138] The legislature did not intend to grant teachers any rights beyond those reasonably necessary to effect the general purposes of the law.[139] The tenure law must be construed in light of

131. PA. STAT. ANN. tit. 24, § 11-1124 (Purdon 1962 & Supp. 1989).

132. Cigarski v. Lake Lehman School Dist., 46 Pa. Commw. 297, 299-300, 407 A.2d 460, 461 (1979) (citing Theros v. Warwick Bd. of School Directors, 42 Pa. Commw. 296, 401 A.2d 579 (1979)).

133. Hixson v. Greater Latrobe School Dist., 52 Pa. Commw. 92, 95, 421 A.2d 474, 476 (1980).

134. PA. STAT. ANN. tit. 24, §§ 1-101 to 27-2702 (Purdon 1962 & Supp. 1989).

135. PA. STAT. ANN. tit. 24, § 11-1101(2) (Purdon Supp. 1989).

136. Love v. Redstone Township School Dist., 375 Pa. 200, 100 A.2d 55 (1953).

137. Tyrone Area Educ. Ass'n v. Tyrone Area School Dist., 24 Pa. Commw. 483, 356 A.2d 871 (1976).

138. Ehret v. School Dist. of Borough of Kulpment, 333 Pa. 518, 524, 5 A.2d 188, 191 (1939).

139. Coble v. School Dist. of Metal Township, 178 Pa. Super. 301, 307, 116 A.2d 113, 116-17 (1955).

Pennsylvania's constitutional requirement that the General Assembly should provide for the maintenance and support of a thorough and efficient school system.[140]

The School Code permits school boards to exercise vast discretion with regard to personnel decisions. The school boards have the power to employ the necessary professional employees, substitutes, and temporary employees to keep the public schools open in their respective districts.[141] The school board has the right and power to determine how to fill all vacancies in the teaching staff.[142] A school board could present several justifications for using permanent replacements instead of substitute teachers. A school board might prefer permanent replacements because of financial considerations, or because it cannot acquire adequate personnel on a temporary basis.[143] Ordinarily, courts will not interfere with the school boards' exercise of discretion in performing their functions; when the boards' actions are challenged, the burden of proof rests upon those challenging the board's authority.[144]

Any analysis must consider that the tenure laws were adopted before public employees were given the right to bargain collectively.[145] The General Assembly that passed the Teacher Tenure Act could not have envisioned that public employees would one day be given the right to strike.[146] It is doubtful that the courts would apply the tenure provisions in the labor dispute context because the Teacher Tenure Act's provisions were not intended to apply to such circumstances. The Pennsylvania courts have not had occasion to consider this issue. Other jurisdictions that have considered whether teacher tenure laws apply in the labor dispute context, have concluded that those protections were not intended to extend to labor disputes.[147] One jurisdiction has clearly ruled that teachers who en-

140. *Ehret*, 333 Pa. at 525, 5 A.2d at 192 (1939).

141. PA. STAT. ANN. tit. 24, § 11-1105 (Purdon 1962).

142. Hetrick v. School Dist. of Sunbury, 335 Pa. 6, 11, 6 A.2d 279, 281 (1939).

143. The school district may have to continue paying peripheral personnel, such as bus drivers, administrative personnel, or janitors, for which the school district receives a diminished value unless school can continue in session. In addition, substitutes may require additional training. If the school district can demonstrate legitimate and substantial business reasons, displaced strikers may not be entitled to the next available job either. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 380 (1967).

144. *Hetrick*, 335 Pa. at 11, 6 A.2d at 282.

145. The PERA established the right to bargain collectively in 1970. The Teacher Tenure Act was adopted in 1937.

146. Until the PERA was adopted in 1970, public employees could not legally strike.

147. *See* Board of Trustees of Billings School Dist. No. 2 of Yellowstone County v. State, 185 Mont. 104, 604 P.2d 778 (1979) *and* Rockwell v. Crestwood School Dist. Bd. of Educ., 393 Mich. 616, 227 N.W.2d 736 (1975).

gage in strikes may be permanently replaced, while a second has suggested that permanent replacement of teachers is permissible.

C. *Permanent Replacement of Teachers in Other Jurisdictions*

Two jurisdictions have confronted the issue of permanent replacement of striking teachers: Michigan and Montana. In *Rockwell v. Crestwood School District Board of Education*,[148] the Michigan Supreme Court stated that public employers have the same right to replace strikers as their private sector counterparts.[149] The court observed that when public employees strike, "the public employer must, like a private employer, be able to hire employees so that the public business is not interrupted."[150] The court noted that "[i]n order to hire competent replacements, it may be necessary for the public employer to offer permanent employment and thus displace strikers. When essential services have been suspended, the hiring of replacements often cannot await time-consuming adjudicatory processes."[151]

In *Rockwell*, the court decided that the due process clause did not require that the strikers receive a hearing before being replaced.[152] The court implicitly assumed that the school district had the right to permanently replace striking teachers.

Michigan teachers are protected by a tenure act very similar to the Pennsylvania Teacher Tenure Act.[153] The court held that the "Teacher's Tenure Act was not intended, either in contemplation or design, to cover labor disputes between school boards and their employees."[154] The court noted that the legislature that enacted the tenure law in 1937 "could not have anticipated collective bargaining or intended to provide for the resolution of labor disputes in public employment."[155] The court added that the purposes of the tenure act would not be frustrated if the tenure statute were not applied to labor disputes.[156]

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148. 393 Mich. 616, 227 N.W.2d 736 (1975).

149. *Id.* at 634-35, 227 N.W.2d at 744.

150. *Id.*

151. *Id.* at 635, 227 N.W.2d at 744.

152. The teachers were replaced while engaging in an illegal strike. Michigan law prohibits strikes by public employees. MICH. COMP. LAWS § 423.206 (1984).

153. *See* MICH. COMP. LAWS §§ 38.71-40.10 (1984).

154. Rockwell v. Crestwood School Dist. Bd. of Educ., 393 Mich. 616, 638, 227 N.W.2d 736, 741-42 (1984).

155. *Id.*

156. *Id.* at 640, 227 N.W.2d at 743. The court noted that the goals of Michigan's tenure act "are to 'maintain an adequate and competent staff, free from political and arbitrary interference' " and to promote good order by preventing the "removal of capable teachers at the

In *Board of Trustees of Billings School District No. 2 of Yellowstone County v. State*,[157] the Montana Supreme Court did not question the employer's assertion that it had a right to permanently replace school teachers engaged in a lawful strike.[158] The school district sent a letter to striking teachers indicating that they would be replaced unless they returned to work by a specified date.[159] The court relied on cases construing the National Labor Relations Act and contended that the district had a legal right to permanently replace workers.[160] The Montana Supreme Court did not question the employer's claim[161] even though the Montana Collective Bargaining Act did not address the replacement issue.[162]

The court concluded that the school district committed an unfair labor practice.[163] The court noted, however, that the decision rested on the school board's failure to hire permanent replacements after the expiration of the deadline.[164] The court concluded that this failure revealed that the school district's real motivation for sending the letter was to halt the strike and not to keep the schools open.[165] If the district had replaced the teachers to keep the schools open, apparently no unfair labor practice would have been found. The court assumed that school districts could replace striking employees.

No compelling reasons exist for rejecting the precedents of other jurisdictions. Those courts that have considered the permanent replacement issue have decided that teacher tenure laws do not prohibit use of the replacement option.[166] These states have tenure laws similar to those of Pennsylvania.[167] Those jurisdictions do not apply tenure laws to public sector labor disputes; nor should Pennsylvania.

D. Constitutional Due Process Concerns

Constitutional concerns may further limit the ability of school districts to permanently replace striking teachers. When a public

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personal whims of changing political office holders." *Id.* at 639-40, 227 N.W.2d at 742-43.

157. 185 Mont. 104, 604 P.2d 778 (1979).

158. *Id.* at 109, 604 P.2d at 781.

159. *Id.* at 106, 604 P.2d at 779.

160. *Id.* at 109, 604 P.2d at 781.

161. *Id.*

162. *See* MONT. CODE ANN. §§ 39-31-101 to -409 (1989).

163. Board of Trustees of Billings School Dist. No. 2 of Yellowstone County v. State, 185 Mont. at 109, 604 P.2d at 781 (1979).

164. *Id.*

165. *Id.*

166. *See supra* notes 148-65 and accompanying text.

167. *Compare* PA. STAT. ANN. tit. 24, §§ 11-1101 to -1132 (Purdon 1962 & Supp. 1989) *with* MICH. COMP. LAWS §§ 38.71-40.10 (1984) *and* MONT. CODE ANN. §§ 20-4-203 to -207 (1989).

employer acts to affect the employment status of a public employee, the employer's action is state action for purposes of constitutional analysis.[168] When the government grants an individual a benefit such as public employment, it can revoke that benefit only through constitutionally adequate procedures.[169]

The United States Supreme Court established a framework for evaluating due process claims. In the employment context, it must first be determined if the employee's interest in the job rises to the level of a liberty or property interest, thereby invoking the protections of the due process clause.[170] Second, if the employee enjoys such an interest, it must be determined how much process is due.[171]

The Court noted that to have a property interest in employment, the employee must have more than a unilateral expectation of employment; there must be a legitimate claim of entitlement to it.[172] These legitimate claims of entitlement are created by rules or understandings from an independent source, such as state law.[173] Accordingly, state law is one of the sources that determines the existence and defines the contours of the employee's interest.

Teacher tenure laws clearly appear to create property interests, because teachers are guaranteed continued employment unless and until they are guilty of some wrongdoing. In *Perry v. Sinderman*,[174] the Court concluded that a property interest could be created by a university's unwritten personnel policy, if that policy rose to the level of a de facto tenure policy.[175] Each Pennsylvania teacher who is covered by the Teacher Tenure Act has a property interest created by the Commonwealth's laws.[176] This interest would be threatened to some degree if the teacher was permanently replaced while on strike. However, the existence of an employee property interest does not preclude the employer from taking adverse personnel action.[177] The

168. Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 407-08 (1977).

169. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). Under the fourteenth amendment, no state may "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

170. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

171. *Id.*

172. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

173. *Id.*

174. 408 U.S. 593 (1972).

175. *Id.* at 600-03.

176. The Teacher Tenure Act provides that teachers are entitled to their positions unless they commit one of the acts specified by the law. *See* PA. STAT. ANN. tit. 24, §§ 11-1101 to -1132 (Purdon 1962 & Supp. 1989).

177. The due process requirement does not prevent an employer from taking away the property interest. The employer may not take the interest away without due process of law.

due process clause merely requires that procedural safeguards be established and followed to protect against wrongful taking.[178]

The Supreme Court resisted the temptation to prescribe appropriate procedures in given cases. Instead, the Court indicated that three factors should be considered to determine whether due process has been given in a particular case.[179] The Court considers (1) the extent of the employee's interest; (2) the value of additional procedural safeguards; and (3) the government's interest in avoiding cumbersome proceedings.[180] The Court made it clear that state and federal government agencies do not enjoy the complete freedom to discharge employees that would be enjoyed by a private employer.[181]

The Supreme Court's holding in *Cleveland Board of Education v. Loudermill*[182] suggests what due process would be required for permanently replaced teachers. In *Loudermill*, the Court observed that a full adversarial hearing prior to termination need not be afforded if opportunity exists for a full post-termination hearing.[183] Under the due process clause, however, an employee is entitled to oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond prior to termination.[184] Consequently, it would appear that due process would be satisfied if the school board notifies a striking employee prior to hiring permanent replacements that the striker must make an unconditional offer to return to work by a certain date or seek to be heard and offer reasons why the employee should not be replaced.[185]

Offering pre-replacement notice and an opportunity to be heard should satisfy the due process requirements set forth in *Loudermill*. Permanent replacement of an employee is not tantamount to dis-

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The due process clause simply establishes the procedural requirements that must be followed to protect against wrongful taking. *See infra* note 178.

178. *Cf.* Fuentes v. Shevin, 407 U.S. 67, 96-97 (1972) (essential reason for required procedure is to protect against erroneous deprivations of property).

179. Mathews v. Eldrige, 424 U.S. 319, 335 (1976).

180. *Id.*

181. Cafeteria Workers v. McElroy, 367 U.S. 886, 897-98 (1961).

182. 470 U.S. 532 (1985).

183. *Id.* at 546.

184. *Id.*

185. This procedure would fit the *Loudermill* requirements. Replacement does not deny the employee's property interest. The employee is still entitled to a job when the next vacancy occurs. *See supra* note 28 and accompanying text. Additionally, the NLRA protects the employee from unfair labor practices. *See supra* note 35 and accompanying text. It would also be illegal at this stage for the employer to fire the employee. *See supra* note 23 and accompanying text. Therefore, these provisions afford the employee the necessary protections. The letter provides the employee with notice of the charges and the employer's evidence. In the notice the employer would also give the employee an opportunity to respond to the charges. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985).

charge. By alerting the striking teachers to the risks of continued strike activity and providing them with an opportunity to be heard, the school district would provide protection against the teachers' loss of property interests.[186] In addition, crucial aspects of the teachers' employment interests, such as seniority and protection from unfair labor practices, would still be protected under the employee's employment relationship.[187] Thus, the due process clause does not prevent the permanent replacement of striking teachers.

V. Public Policy Justifications for Permitting School Boards to Permanently Replace Striking Teachers

A comparison of the characteristics of private and public sector strikes indicates why permanent replacement should be allowed in the public sector. The private sector union normally strikes in order to inflict economic harm on the employer.[188] A strike causes the employer to lose income by cutting production and, therefore, revenue. The threat of heavy economic losses induces the employer to concede to union demands.

Several factors force unions to be moderate in the use of the strike weapon. If the union acquires unduly high wage levels for its members, the concessions increase the costs to the employer. These increased costs are usually absorbed by increasing the price of the employer's products.[189] The increased price of the product may cause consumers to switch to alternative products or cheaper competitors. Lost profits may be reflected in layoffs or subsequent wage cutbacks.[190] Additionally, a prolonged strike may lead to increased consumer prices, which would cause the employer to lose profits.[191]

The employer, on the other hand, faces immediate losses in revenue and risks losing the ability to compete during prolonged

186. The teachers might also have a claim that they have been deprived of their liberty interests. *See* Board of Regents v. Roth, 408 U.S. 564, 571-75 (1972). The Court established a restricted view of liberty interests since *Roth*, however. *See* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 420-34 (1977). To establish a violation of a liberty interest, an employee must show: (1) stigmatization as a result of a discharge process; (2) that the stigmatization resulted from false charges; (3) that the charges were made public; and (4) that the employee was denied a meaningful opportunity to clear his name at a hearing. Wells v. Doland, 711 F.2d 670, 676 (5th Cir. 1983).

187. NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938).

188. *See* GOLDMAN, LABOR LAW AND INDUSTRIAL RELATIONS IN THE UNITED STATES OF AMERICA 224 (1984).

189. WELLINGTON & WINTER, THE UNIONS AND THE CITIES 15-17 (1971).

190. *Id.*

191. A prolonged strike would cause the employer to lose substantial sums of money. To cover these losses and the union concessions, the employer will increase the costs of his goods, thereby stoking the inflationary fire. *See supra* note 31 and accompanying text.

strikes.[192] This mutual economic pressure normally encourages both sides to seek accommodation.[193] Occasionally, however, a private sector union may wield a great deal of bargaining power and may be willing to force heavy economic losses upon the private sector employer.[194] To counter this pressure, private employers may permanently replace striking workers in order to keep production going. The employer will normally attempt to keep production going only when it has lost confidence in the union, or when competitive conditions require continued operation.[195] Thus, the permanent replacement option helps to keep bargaining power in balance.

By contrast, public employees do not gain bargaining power by directly harming the public employer.[196] Public sector unions gain power by depriving the public of necessary services. The demand for governmental services such as education, unlike that for most consumer goods, is highly inelastic.[197] The general public cannot obtain these services from another source.[198] Teacher strikes interrupt the provision of educational services to the community. When education is not provided, great political pressure is placed upon the school board.[199] If the union can inflict a sufficiently severe interruption in educational services, pressure will mount on the board members to settle the dispute. Finally, public employee union members can vote or not vote as a group, thereby exercising the power of block voting to influence the public employer.[200]

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192. Dripps, *New Directions for the Regulation of Public Employee Strikes*, 60 N.Y.U. L. REV. 590, 605 (1985).

193. *Id.* at 607.

194. Some unions, such as those representing automobile workers and steel workers, operate in concentrated industries that are very dependent on union cooperation. Such unions can bargain more effectively than unions in other industries that may have undergone deregulation, faced anti-union competition, or in which employers may easily relocate to nonunion jurisdictions.

195. Unkovic & Harty, *Management's Legal Problems in Continuing Plant Operations During an Economic Strike Under Federal and Pennsylvania Law*, 67 DICK. L. REV. 63, 64 (1968).

196. Public employers are insulated from direct hardships. Economic losses may drive private employers out of business. By contrast, the school board members will remain in their elected offices regardless of the direct economic effects of a strike. Public employee strikes affect the school boards by causing the community at large to pressure the individual members. This mounting pressure placed on members by angry parents pressures the school board to make concessions. *Cf.* Dripps, *New Directions for the Regulation of Public Employee Strikes*, 60 N.Y.U. L. REV. 590, 603-15 (1985).

197. Although there are private schools throughout the United States, most families find them unaffordable. Most Americans have little choice but to rely on the public education system.

198. WELLINGTON & WINTER, THE UNIONS AND THE CITIES 18 (1971).

199. Decker, *The Right to Strike for Pennsylvania's Public Employees—Its Scope, Limits, and Ramifications for the Public Employer*, 17 DUQ. L. REV. 755, 759 (1978-79).

200. *See* Dalton, *A Theory of the Organization of State and Local Government Em-*

Public sector labor unions also have fewer incentives to moderate their bargaining positions and use of strikes. A public union that acquires a substantial wage increase need not worry that the employer will lose its competitive edge. The cost of wage settlements can be buried in larger government budgets and paid out of general taxes.[201] In addition, no matter how expensive education becomes, the public usually feels that it must maintain at least a level of service sufficient to guarantee quality education.[202]

Teachers enjoy significant economic strengths not enjoyed by private sector employees. When private sector employees decide to strike, they face the prospect of losing pay for the duration of the strike. Pennsylvania teachers may actually recoup much of their lost wages. The Commonwealth is required to provide its students with an instructional period of 180 days.[203] The occurrence of a teacher strike will not necessarily excuse failure to meet this requirement.[204] In this respect, teachers are able to receive their full salaries because teachers' annual pay is usually based upon the completion of a minimum academic year.[205] School boards must be able to permanently replace striking teachers in order to counter the great bargaining advantages of these public employees.

Because the government is essentially the sole supplier of educational services, teacher strikes deny educational services to the community. Because of this denial of public services, public employers should have a greater right to replace workers than private sector employers. In the private sector bargaining context, the interests of two parties, the employee and the employer, must be reconciled. In public sector bargaining, there exists an additional party: the public. The public employer has additional responsibility as the sole supplier of essential public services.[206]

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ployees, 3 J. LAB. RES. 163, 165 (1982).

201. WELLINGTON & WINTER, THE UNIONS AND THE CITIES 17-21 (1971).

202. *Id.*

203. PA. STAT. ANN. tit. 24, § 15-1501 (Purdon Supp. 1989). This section provides:

> All public kindergartens, elementary and secondary schools shall be kept open each school year for at least one hundred eighty (180) days of instruction for pupils. No days on which the schools are closed shall be counted as days taught, and no time shall be counted as a pupil session for any activity to which admission is charged. Unless otherwise provided in this act, the board of school directors in any district or joint board may keep such other schools or departments as it may establish open during such time as it may direct.

204. Scanlon v. Mount Union Area Bd. of School Directors, 51 Pa. Commw. 83, 89-90, 415 A.2d 96, 99 (1980), *aff'd*, 499 Pa. 215, 452 A.2d 1016 (1982).

205. GOVERNOR'S STUDY COMMISSION, *supra* note 82, at 28.

206. The Pennsylvania Constitution requires school districts to establish and maintain a thorough and efficient system of education. The government cannot feasibly provide educa-

In Pennsylvania, the state constitution requires the school boards to provide the citizens of the Commonwealth with a thorough and efficient system of education.[207] By disrupting the educational process, teacher strikes interfere with the students' constitutionally guaranteed right to an education.[208] The teachers' right to strike must be subject to the paramount right of the citizens to an adequate education.[209]

Prolonged strikes have extremely detrimental effects on students. Studies have linked decreased student achievement and development to organizational conflict between teachers and school boards.[210] Conflict between the school board and teachers creates stress and a negative climate for students.[211] Studies have indicated a negative effect on overall student attitudes as a result of the length and overall timing of teachers strikes.[212]

School boards must be allowed to hire permanent replacements in order to limit the effects of teacher strikes upon the community. Judicious use of this option will mitigate the effects of strikes and the threat of replacement will buffer union bargaining power and minimize the incidence of strikes.

VI. Conclusion

Private sector employers have long enjoyed the right to hire permanent replacements for economic strikers. Integral to the collective bargaining process is the exertion of economic pressure by employers and unions against each other to achieve bargaining objectives. The conflict between the worker's right to strike and the private employer's ability to replace striking workers represents the pressure and counterpressure of free market forces. Generally, the replacement option has helped unions and employers seek accommodation and reduce the incidence of strikes.

Like other public employees, teachers have been granted many new rights, such as the limited right to strike, in the past two de-

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tional services without public employees. Other public departments could conceivably hire private firms to perform work previously done by the public employees. For an interesting example of such a strategy, see *Willimatic, Conn., Fire Personnel Take Cuts to Beat Out Private Firm*, 21 GOV'T EMPL. REL. REP. (BNA) 863 (Apr. 18, 1983).

207. PA. CONST. art. III, § 14.

208. GOVERNOR'S STUDY COMMISSION, *supra* note 82, at 31 (minority recommendation).

209. *Id.* at 32.

210. REPORT OF THE SENATE TASK FORCE ON ACT 195 22 (1983-84).

211. *Id.*

212. Caldwell & Moskalski, *The Effects of School District Strikes on Student Achievement*, 2 GOV'T UNION REV. 4-6 (Fall 1981).

cades. This right to strike is a significant weapon for teachers. In many respects the teachers' bargaining position is actually stronger than that of private sector employees. In addition, the effects of teacher strikes are far more harmful to the general public. These risks loom even larger as teachers' unions become more militant.

Pennsylvania school boards should be able to permanently replace striking teachers in order to counter union bargaining strength. Nothing in the Pennsylvania Public Employe Relations Act, the Teacher Tenure Act, the School Code, or the United States Constitution prevents a school district from hiring permanent replacements for teachers who engage in strike activity. Limited use of such an option would encourage both sides to seek accommodation. Thus, permanent replacements might both mitigate the effects of strikes upon the community and reduce the incidence of strike activity.

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